

# Unlawful Voters: Grounds of Inadmissibility and Deportability

## I. Unlawful Voters Provisions

- A. Inadmissibility: “Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible.” Section 212(a)(10)(D)(i) of the Act.
- B. Deportability: “Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.” Section 237(a)(6)(D)(A) of the Act.
- C. Exceptions under sections 212(a)(10)(D)(ii) and 237(a)(6)(B) of the Act – The alien shall not be considered to be inadmissible or deportable as an unlawful voter if:
  - 1. Each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization),
  - 2. The alien permanently resided in the United States prior to attaining the age of 16, and
  - 3. The alien reasonably believed at the time of such violation that he was a citizen.

Note: Additionally, section 101(f) of the Act provides that unlawful voting may bar a finding of good moral character.

## II. Establishing an Unlawful Voter Allegation

- A. The alien (1) voted and (2) did so in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation.
- B. A conviction is not required.

## III. Case Law

- A. An alien who has voted in an election involving candidates for Federal office in violation of 18 U.S.C. § 611(a) is removable under section 237(a)(6)(A) of the Act regardless of whether the alien knew that he or she was committing an unlawful act by voting. *Matter of Fitzpatrick*, 26 I&N Dec. 559 (BIA 2015).
- B. The Ninth Circuit in *McDonald v. Gonzales*, 400 F.3d 684 (9th Cir. 2005) concluded that a lawful permanent resident who voted in a Hawaii state election and was subsequently charged with removability under section 237(a)(6)(A) did not violate Hawaii law because she was unaware that she was not entitled to vote and the statute required proof of an alien’s knowledge that voting was forbidden.
- C. The Seventh Circuit upheld the Board’s decision that an alien was inadmissible as an unlawful voter where he voted in a Presidential election in violation of 18 USC

§ 611(a). *Kimani v. Holder*, 695 F.3d 666 (7th Cir. 2012).

1. The *Kimani* court distinguished *McDonald v. Gonzales*, because it involved a state statute, which unlike 18 USC § 611(a), required “proof of an alien’s knowledge that voting [was] forbidden.” *Kimani v. Holder*, 695 F.3d at 669-70; *Matter of Fitzpatrick*, 26 I&N Dec. at 561 n.4.
  2. The court stated that 18 USC § 611(a) is a general intent statute, “which requires only proof that the defendant performed the acts that the law forbids, understanding what he was doing.” *Kimani v. Holder*, 695 F.3d at 669.
  3. The court rejected the alien’s entrapment by estoppel argument where he checked two boxes representing that he was a U.S. citizen and requesting voter registration when applying for a driver’s license. *Id.* at 670-71. The alien did not argue that any official told him it was lawful for aliens to claim to be citizens or that any public official directed him to register to vote. *Id.*
- D. In the companion case of *Keathley v. Holder*, 696 F.3d 644 (7th Cir. 2012), the Seventh Circuit recognized that entrapment by estoppel (or “official authorization”) could be a defense to finding that an alien violated 18 USC § 611.
1. When registering for a driver’s license, the alien represented herself to be a citizen of the Philippines, presenting her Philippine passport and her K-3 visa, but the IJ did not make specific findings because he believed entrapment by estoppel was irrelevant in immigration proceedings. *Keathley v. Holder*, 696 F.3d at 645-46.
  2. If the alien’s statements were credited on remand, of particular relevance would be exploring “the extent to which motor-voter registrars are authorized to interpret the terms of that legislation and the requirements of valid registration and to give binding advice to applicants.” *Id.* at 647.
    - a) The “power to register someone supposes some authority to ascertain whether legal qualifications have been met, and officials are supposed to inform applicants about the eligibility rules for voting.” *Id.* at 646-47.
- E. In *Fitzpatrick v. Sessions*, 847 F.3d 913, 915 (7th Cir. 2017), the Seventh Circuit reiterated that the defense of entrapment by estoppel (or “official authorization”) is available to an alien who “makes complete and accurate representations to a public official and then receives permission from that official, when acting within the scope of his or her authority.”

#### **IV. Exception Under 18 USC §§ 611(a)(1)-(3)**

- A. The Federal statute 18 USC §§ 611(a)(1)-(3) contains an exception if:
1. The election is held partly for some other purpose than Federal offices,
  2. State law or local law allows the alien to vote for other purposes, and
  3. Voting for the other purposes is conducted independently of voting for candidates for Federal office such that the alien could vote only for the other purposes and not for the Federal offices.

- B. In *Matter of Fitzpatrick*, the alien did not show that state or local law authorized her to vote in the 2006 election for local offices. Moreover, DHS presented copies of the ballot from that election which included Federal state and local offices. *Matter of Fitzpatrick*, 26 I&N Dec. 559 (BIA 2015).